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ANN JOO STEEL BHD v. PENGARAH TANAH DAN GALIAN NEGERI PULAU PINANG & ANOR AND ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ZAHARAH IBRAHIM CJ (MALAYA)
RAMLY ALI FCJ
B AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
ROHANA YUSUF FCJ
[CIVIL APPEALS NO: 01(f)-3-02-2018 & 01(f)-5-02-2018]
31 JULY 2019

C

LAND LAW: *Boundary – Determination of – Dispute over boundary of adjacent land – Boundary of adjacent land measured by traverse mark method ('first decision') – Land Titles Appeal Board held first decision could not be appealed against – Aggrieved party appealed to High Court – High Court ordered remittance of matter*
D *to District Commissioner for Land Titles for re-determination – Deputy Director decided boundary of land measured by high water mark method ('second decision') – Whether High Court seized with jurisdiction to hear appeal – Whether first decision final and conclusive – Whether could be appealed against – Whether High Court order and second decision made in compliance with substantive statutory*
E *provisions – National Land Code (Penang and Malacca Titles) Act 1963, ss. 15, 16, 19, 27(3) & 29(1)*

CIVIL PROCEDURE: *Judgments and orders – Orders – Compliance of – Dispute over boundary of adjacent land – Boundary of adjacent land measured by traverse mark method ('first decision') – Land Titles Appeal Board held that first decision*
F *could not be appealed against – Aggrieved party appealed to High Court – High Court ordered remittance of matter to District Commissioner for Land Titles for re-determination – Deputy Director decided boundary of land measured by high water mark method ('second decision') – Whether High Court seized with jurisdiction to hear appeal – Whether High Court order valid – Whether there was appeal or*
G *application to set aside High Court order – Whether High Court order binding on parties – National Land Code (Penang and Malacca Titles) Act 1963, ss. 15, 16, 19, 27(3) & 29(1)*

Tenaga Nasional Berhad ('first defendant') occupied a reclaimed land adjacent to the land ('Lot 78') owned by the appellant ('plaintiff'). The
H Collector of Land Revenue Butterworth had determined and set out the boundary of Lot 78, in accordance with the traverse mark ('TM') method ('Collector's decision'). According to the plaintiff, the TM method resulted in a loss of the plaintiff's land area as it would obtain an additional estimated area of 7.5 acres ('disputed land') if the high water mark ('HWM') method
I was employed. The plaintiff applied to the Director of Land Titles, Pulau Pinang, to re-determine the measurement of Lot 78 but the Deputy Director of Titles, Pulau Pinang ('Deputy Director') affirmed the Collector's decision ('first decision'). The plaintiff then appealed to the Land Titles Appeal Board

('the Board') but the appeal was dismissed on the basis that the first decision was a final decision, under ss. 27(3) and 28(3) of the National Land Code (Penang and Malacca titles) Act 1963 ('the Act'), and not appealable under s. 15 of the Act. This prompted the plaintiff to file an appeal, against the decision of the Board, at the High Court. The High Court ordered that the matter be remitted to the District Commissioner of Land Titles for it to be determined ('the 1995 order'). The parties did not appeal against the 1995 order. The Deputy Director complied with the 1995 order and, after an enquiry, decided and measured the boundary of Lot 78 in accordance with the HWM method ('second decision'). This resulted in the disputed land forming part of Lot 78. The first defendant, still in occupation of the reclaimed land, applied for an alienation of a portion of the reclaimed land which included the disputed land. When the first defendant queried on the status of the disputed land, it was informed by the officer of the Pulau Pinang Lands and Mines Office ('third defendant') that the first decision was correct while the second decision was not. The plaintiff then commenced an action, at the High Court, seeking various declarations and orders (i) that the second decision would have to be complied with by the defendants; and (ii) for the first defendant to vacate the disputed land. The High Court held that, *inter alia*, (i) the 1995 order was valid and the second decision was a good decision; (ii) the defendants failed to substantiate their claim to dispute the 1995 order; and (iii) on the argument that had the 1995 order been made on questions of law, it should be remitted to the Board and not the Director, s. 21 of the Act applied. Two appeals were lodged before the Court of Appeal, against the decision of the High Court; one by the first defendant and the other by the second and third defendants. The Court of Appeal allowed both appeals on the grounds that (i) since the first decision was a decision on border dispute, it was final under s. 27(3) of the Act, and therefore, there could not be any appeal to the Board, pursuant to s. 15 of the Act; (ii) there was no competent appeal before the Board to enable further appeal to the High Court and therefore, the 1995 order was null and void. Hence, the present appeals by the plaintiff. The questions that arose for determination were (i) whether a party, seeking to collaterally attack/challenge a sealed and perfected court order, is required to take an active step in filing up an application, either in the same or separate proceedings brought for that purpose, to set aside the court order, in circumstances where the party failed to appeal; and (ii) whether the principle enunciated in *Tenaga Nasional Berhad v Bandar Nusajaya Development Sdn Bhd* ('*TNB* case'), that an administrative body/tribunal/decision-maker was not entitled to review its previous decision, could be extended to circumstances where the administrative decision-maker had reviewed its previous decision upon the remittance of the matter back to it to be re-determined, acting in compliance with a sealed and perfected court order.

A B C D E F G H I

Held (allowing appeal)
Per Rohana Yusuf FCJ delivering the judgment of the court:

(1) The defendants bore the burden of proving that the appeal, before the High Court, was not on question of law but merely on facts. The High Court was correct in imposing the burden on the defendants to prove that the appeal was wrongly brought by the plaintiff. It was the findings of the High Court that the defendants failed to adduce evidence in support of their contentions. The conclusion of the Court of Appeal that it was made on questions of facts was not supported by evidential proof. The defendants should have raised their objections. Instead, they accepted that decision as they never appealed against the 1995 order. By not appealing against the 1995 order, the defendants accepted the correctness of the decision. Despite not challenging the 1995 order, the first defendant merely ignored the second decision. Likewise, the second and third defendants too, having failed to appeal on the 1995 order, and having complied with the same, chose to question back what was, in fact, their own decision. (paras 29 & 30)

(2) The 1995 order was clearly a remittance order for the matter to be decided in accordance with law. Although the Court of Appeal viewed the nature of the 1995 order as not conclusive that the appeal was on points of law, an order, for the matter to be decided in accordance with law, implied that the decision before the court was not in compliance with the law in the first place. Even though a tracing through the various clauses might suggest that there was to be no appeal on border dispute, as envisaged by s. 27(3) of the Act, it must be noted that s. 19 of the Act indeed conferred appellate jurisdiction on the High Court. Hence, it could not be said that the High Court was not seized with jurisdiction, at all, to hear the appeal. (para 32)

(3) The 1995 order was not issued in clear breach of a statute. Decided authorities were clear that an order of the court becomes a nullity only when it is made in clear breach of a statute, hence in excess of jurisdiction. The High Court, in issuing the 1995 order was not in clear breach of any statute and was not in excess of jurisdiction. Hence, the 1995 order was not a nullity. Consequently, the second decision was valid and enforceable. (paras 41 & 51)

(4) There is a legal presumption that an order of a court is validly made, unless it was obtained by fraud, *etc*. The 1995 order was made by the High Court with unqualified participation of all relevant parties, represented by their respective counsel. A court order that is regularly made could not be ignored on the belief of a party that it is a nullity. Any such attempt would militate against the basic legal position that a regularly made order of court must be observed at all costs. A party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because, in his view,

it is not valid. There will be no end to litigation if parties are allowed to determine, for themselves that any order of the court would be observed or otherwise. One may apply to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It could not be contested merely by raising it as defences in a suit, as being undertaken in these appeals. (paras 60, 65 & 66)

(5) In the *TNB* case, the relevant issue was whether an administrative tribunal could review its own decision despite the finality clause. It was different in the present appeals. The *TNB* case dealt with a different factual scenario and was not relevant to the facts of the instant appeals. The administrative body in the present appeals issued the second decision, in adherence to the 1995 order of the High Court. (paras 69 & 70)

Bahasa Malaysia *Headnotes*

Tenaga Nasional Berhad ('defendan pertama') menduduki sebidang tanah tebus guna bersebelahan tanah milik perayu ('plaintif'). Pemungut Hasil Tanah Butterworth telah memutuskan dan menetapkan sempadan Lot 78, selaras dengan kaedah tanda melintang ('TM'). Menurut plaintif, kaedah TM menyebabkan kehilangan bahagian tanah plaintif kerana plaintif akan memperoleh kawasan tambahan yang dianggarkan seluas 7.5 ekar ('tanah yang dipertikai') jika kaedah tanda air pasang ('TAP') diguna pakai. Plaintif memohon pada Ketua Pengarah Hak Milik Tanah, Pulau Pinang untuk memutuskan semula ukuran Lot 78 tetapi Timbalan Ketua Pengarah Hak Milik, Pulau Pinang ('Timbalan Ketua Pengarah') mengesahkan keputusan Pemungut ('keputusan pertama'). Plaintif kemudian merayu ke Lembaga Rayuan Hak Milik Tanah ('Lembaga') tetapi rayuan ini ditolak atas alasan keputusan pertama muktamad, bawah ss. 27(3) dan 28(3) Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 ('Akta'), dan tidak boleh dirayu bawah s. 15 Akta. Ini menyebabkan plaintif memfailkan rayuan, terhadap keputusan Lembaga, di Mahkamah Tinggi. Mahkamah Tinggi memerintahkan hal perkara tersebut dikembalikan pada Pesuruhjaya Hak Milik Tanah Daerah agar diputuskan ('perintah 1995'). Pihak-pihak tidak merayu terhadap perintah 1995. Timbalan Ketua Pengarah mematuhi perintah 1995 dan, selepas menjalankan inkuiri, memutuskan dan mengukur sempadan Lot 78 menurut kaedah TAP ('keputusan kedua'). Akibatnya, tanah yang dipertikai membentuk sebahagian Lot 78. Defendan pertama, yang masih menduduki tanah tebus guna, memohon memberi milik sebahagian tanah tebus guna yang termasuk tanah yang dipertikai. Apabila defendan pertama bertanya tentang status tanah yang dipertikai, defendan pertama dimaklumkan oleh Pegawai Tanah dan Galian Pulau Pinang ('defendan ketiga') bahawa keputusan pertama betul manakala keputusan

kedua salah. Plaintif memulakan satu tindakan, di Mahkamah Tinggi, memohon pelbagai pengisytiharan dan perintah (i) bahawa keputusan kedua perlu dipatuhi oleh defendan-defendan; dan (ii) agar defendan pertama mengosongkan tanah yang dipertikai. Mahkamah Tinggi memutuskan, antara lain, (i) perintah 1995 sah dan keputusan kedua juga sah; (ii) defendan-defendan gagal membuktikan tuntutan mereka dalam mempertikai perintah 1995; dan (iii) tentang hujahan bahawa jika perintah 1995 dibuat berdasarkan persoalan undang-undang, ini harus dikembalikan kepada Lembaga dan bukan Pengarah, s. 21 Akta terpakai. Dua rayuan difailkan di Mahkamah Rayuan, terhadap keputusan Mahkamah Tinggi; satu oleh defendan pertama dan satu lagi oleh defendan kedua dan ketiga. Mahkamah Rayuan membenarkan kedua-dua rayuan atas alasan (i) oleh sebab keputusan pertama adalah keputusan tentang pertikaian sempadan, keputusan pertama muktamad bawah s. 27(3) Akta dan, ekoran itu, tidak boleh timbul rayuan pada Lembaga, bawah s. 15 Akta; (ii) tiada rayuan kompeten di Lembaga untuk seterusnya membolehkan rayuan di Mahkamah Tinggi dan berikutan itu, perintah 1995 tidak sah dan terbatal. Maka timbul rayuan-rayuan ini oleh plaintif. Soalan-soalan yang timbul untuk diputuskan adalah (i) sama ada satu-satu pihak, yang berkehendak menyerang/mencabar satu perintah mahkamah yang termeterai dan sempurna, secara kolateral, perlu mengambil langkah aktif memfailkan permohonan, baik dalam prosiding sama mahupun berlainan untuk tujuan tersebut, mengetepikan perintah tersebut dalam hal-hal keadaan apabila pihak tersebut gagal merayu; dan (ii) sama ada prinsip yang dinyatakan dalam *Tenaga Nasional Berhad v. Bandar Nusajaya Development Sdn Bhd* ('kes *TNB*'), bahawa badan pentadbir/tribunal/pembuat keputusan tidak berhak menyemak keputusannya yang terdahulu, boleh dilanjutkan pada hal-hal keadaan apabila pembuat keputusan pentadbir telah menyemak keputusan-keputusan terdahulunya apabila hal perkara tersebut dikembalikan untuk diputuskan semula, bertindak mematuhi perintah mahkamah yang termeterai dan sempurna.

Diputuskan (membenarkan rayuan)

Oleh Rohana Yusuf HMP menyampaikan penghakiman mahkamah:

(1) Defendan-defendan memikul beban membuktikan rayuan di Mahkamah Tinggi bukan tentang persoalan undang-undang tetapi sekadar fakta. Mahkamah Tinggi betul dalam meletakkan beban pada defendan-defendan untuk membuktikan rayuan dimulakan secara salah oleh plaintif. Mahkamah Tinggi berpendapat defendan-defendan gagal mengemukakan keterangan demi menyokong hujahan mereka. Kesimpulan Mahkamah Rayuan, bahawa ini dibuat berdasarkan persoalan undang-undang, tidak dibuktikan oleh keterangan bukti. Defendan-defendan sepatutnya membangkitkan bantahan-bantahan mereka. Sebaliknya, mereka menerima keputusan tersebut kerana tidak merayu terhadap perintah 1995. Dengan tidak merayu terhadap

keputusan 1995, defendan menerima kebenaran keputusan tersebut. Walaupun tidak mencabar perintah 1995, defendan pertama tidak mengendahkan keputusan kedua. Defendan kedua dan ketiga juga tidak mengendahkannya dan selepas gagal merayu terhadap perintah 1995 dan gagal mematuhinya, memilih mempersoalkan semula sesuatu yang, hakikatnya, keputusan mereka sendiri.

(2) Perintah 1995 jelas satu perintah pengembalian agar hal perkara tersebut diputuskan selaras dengan undang-undang. Walaupun Mahkamah Rayuan melihat sifat perintah 1995 sebagai tidak muktamad tentang hujahan undang-undang, satu perintah, agar hal perkara diputuskan selaras dengan undang-undang, menyiratkan bahawa keputusan di mahkamah, terlebih dahulu, tidak mematuhi undang-undang. Walaupun penelitian pelbagai klausa mungkin mencadangkan tidak boleh ada rayuan terhadap pertikaian sempadan, seperti yang dibayangkan oleh s. 27(3) Akta, mesti diperhatikan bahawa s. 19 Akta sememangnya memberi bidang kuasa rayuan kepada Mahkamah Tinggi. Maka tidak boleh dikatakan bahawa Mahkamah Tinggi tidak berbidang kuasa, sama sekali, mendengar rayuan.

(3) Perintah 1995 tidak dikeluarkan melanggar, secara jelas, satu statut. Nas-nas yang diputuskan jelas bahawa satu perintah mahkamah hanya terbatal apabila dibuat jelas melanggar statut, lantas melangkaui bidang kuasa. Mahkamah Tinggi, dalam mengeluarkan perintah 1995, tidak, secara jelas, melanggar apa-apa statut dan tidak melangkaui bidang kuasa. Oleh itu, perintah 1995 tidak terbatal. Berikutan itu, keputusan kedua sah dan boleh dikuat kuasa.

(4) Terdapat anggapan undang-undang bahawa satu perintah mahkamah dibuat secara sah, kecuali jika diperoleh melalui penipuan dan sebagainya. Perintah 1995 dibuat oleh Mahkamah Tinggi dengan penyertaan tidak berbelah bahagi semua pihak-pihak relevan, yang diwakili oleh peguam-peguam mereka. Satu perintah mahkamah yang dibuat dengan teratur tidak boleh diabaikan atas kepercayaan perintah ini terbatal. Apa-apa usaha akan menghalang kedudukan asas perundangan bahawa satu perintah mahkamah yang dibuat secara teratur mesti dipatuhi dengan apa-apa cara sekalipun. Satu pihak, yang terikat dengan perintah mahkamah tersebut, tiada sebab memutuskan untuk dirinya bahawa perintah mahkamah yang mengikat tidak perlu dipatuhi kerana, pada pendapatnya, tidak sah. Litigasi tidak berkesudahan jika pihak-pihak dibenarkan memutuskan sendiri jika apa-apa perintah mahkamah harus dipatuhi atau sebaliknya. Satu pihak boleh memohon mengetepikan satu perintah mahkamah atasan tetapi ini mesti dilakukan dalam prosiding langsung dan khusus, yang difailkan untuk tujuan itu; sama ada dalam prosiding sama atau berasingan. Ini tidak boleh dipertikai dengan hanya membangkitkannya sebagai pembelaan dalam guaman, seperti yang dilakukan dalam rayuan-rayuan ini.

(5) Dalam kes *TNB*, isunya adalah sama ada satu tribunal pentadbiran boleh menyemak keputusannya sendiri walaupun terdapat klausa kemuktamadan. Ini berbeza dalam rayuan-rayuan ini. Kes *TNB* berhadapan dengan senario fakta berbeza dan tidak relevan dengan fakta rayuan-rayuan ini. Badan pentadbiran dalam rayuan-rayuan ini telah memberi keputusan kedua, selaras dengan perintah 1995 Mahkamah Tinggi.

Case(s) referred to:

Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division [2015] 3 CLJ 1 CA ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chain Cycle Sdn Bhd v. Kerajaan Malaysia [2016] 1 CLJ 218 CA ***(refd)***

Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah, Selangor [2015] 1 LNS 7 CA ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee [2018] 1 CLJ 641 CA ***(refd)***

Isaacs v. Robertson [1984] 3 All ER 140 ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 FC ***(refd)***

Malayan Banking Bhd v. Gan Bee San & Ors And Another Appeal; SKS Foam (M) Sdn Bhd (Intervener) [2019] 1 CLJ 575 FC ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Puah Bee Hong @ Bee Hong (F) & Anor. v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case [1994] 2 CLJ 705 SC ***(refd)***

R v. Poplar Borough Council, ex parte London County Council (No 2) [1922] 1 KB 95 ***(refd)***

Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 SC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***

Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors [2018] 10 CLJ 222 CA ***(refd)***

Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 8 CLJ 163 FC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

TO Thomas v. Asia Fishing Industry (Pte) Ltd [1977] 1 LNS 126 FC ***(refd)***

TRA Mining (Malaysia) Sdn Bhd v. Thien Hong Teck & Ors And Another Appeal [2018] 10 CLJ 438 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 42
Companies Act 1965, s. 314
Companies (Winding-up) Rules 1972, r. 5(1)(a)
Courts of Judicature Act 1964, s. 78
Electricity Supply Act 1990, s. 16(2)
Federal Constitution, art. 121
National Land Code, s. 263
National Land Code (Penang and Malacca Titles) Act 1963, ss. 15, 19(1), 21, 27(3), 28(1), (3), 30(3)
Rules of Court 2012, O. 14A, O. 33 rr. 2, 5

Other source(s) referred to:
Sir Jack Jacob, *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems Vol 23

(Civil Appeal No: 01(f)-3-02-2018(P))
For the appellant - Lim Chee Wee, Kwan Will Sen, Nimalan Devaraja & Kelvin Seah Khye Jie; M/s Skrine
For the respondents - Cyrus Das, Karin Lim Ai Ching, Dominic Pillai RK Pillai, Charanjit Singh Mahinder Singh, Noor Adzraii Noor Azhar & Siti Fatimah Talib; M/s Presgave and Matthews

(Civil Appeal No: 01(f)-5-02-2018(P))
For the appellant - Lim Chee Wee, Kwan Will Sen, Nimalan Devaraja & Kelvin Seah Khye Jie; M/s Skrine
For the respondent - Steven Thiru, David Mathew & Hadi Mukhlis; M/s Steven Thiru & Sudhar Partnership

[Editor's note: For the Court of Appeal judgment, please see Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor v. Ann Joo Steel Sdn Bhd & Another Appeal [2018] 4 CLJ 171 (overruled). For the High Court judgment, please see Ann Joo Steel Bhd v. Tenaga Nasional Bhd & Ors [2017] 2 CLJ 199 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf FCJ:

Introduction

[1] The two appeals before us, relate to the issue on the sanctity and validity of an order of the High Court at Pulau Pinang made in 1995 (the 1995 Order). The order was perfected and not appealed against or set aside. The order was challenged on the basis that, it was made in excess of jurisdiction, hence liable to be set aside. This challenge was brought upon as a defence to a trespass suit filed about ten years after the order was made. The High Court had allowed the trespass suit and dismissed the challenge made on the 1995 Order, but it was reversed by the Court of Appeal.

[2] The appeals emanate from a claim of trespass filed by the plaintiff Ann Joo Steel Berhad on 22 April 2010, against Tenaga Nasional Berhad as the first defendant, Pengarah Tanah dan Galian Negeri Pulau Pinang, the second defendant and Mohd Noor bin Rejab, the officer of Pengarah Tanah dan Galian Negeri Pulau Pinang, the third defendant.

[3] For convenience, we will refer the parties in this judgment as they were referred to in the High Court.

The Background

[4] The background facts to these appeals begin with an application by the predecessor in title of the first defendant, Lembaga Letrik Negara (LLN) in the year 1962, to reclaim 48 acres of land from the sea (the reclaimed land). The State Government of Penang allowed the application of LLN. The land was reclaimed for constructing Prai Power Station which was completed in 1967. LLN and later the first defendant had occupied the reclaimed land pursuant to a temporary occupation license (TOL) which had been renewed annually between the years, 1961 to 2001.

[5] The reclaimed land is adjacent to Lot 78 Seberang Perai Tengah, Bandar Perai, Pulau Pinang (Lot 78). Lot 78 then belonged to Prye (Penang) Syndicate Limited (Prye). The plaintiff (formerly known as Malayawata Steel Limited) purchased Lot 78 from Prye. On 10 December 1970, the Collector of Land Revenue Butterworth had determined and set out the boundary of Lot 78 in Plan No. 544, in accordance with traverse mark. According to the plaintiff, the traverse mark (TM) method had resulted in a loss of land area of the plaintiff as opposed to measurement following high water mark (HWM). The plaintiff claimed it would obtain an additional estimated area of 7.5 acres (the disputed land) if HMW method is to be employed. Since TM was used, this part of the land remained as State land.

[6] Dissatisfied with the Collector's decision, on 12 March 1971 the plaintiff applied to the Director of Land Titles, pursuant to s. 28(1) and s. 30(3) of the National Land Code (Penang and Malacca Titles) Act 1963 (Act 518) to re-determine the measurement of Lot 78. On 22 July 1985, the Deputy Director of Titles, Pulau Pinang (the Deputy Director) affirmed the decision of the Collector (the first decision). The plaintiff then appealed to the Land Titles Appeal Board (the Appeal Board), under s. 15 of Act 518. It was dismissed, on the basis that the first decision was a final decision under s. 27(3) and s. 28(3) thus not appealable under s. 15 of Act 518. The plaintiff then filed an appeal against the decision of the Appeal Board to the High Court pursuant to s. 19(1) of Act 518.

[7] The High Court heard the plaintiff's appeal and issued the 1995 Order on 22 September 1995. By that order, the High Court remitted the matter to the District Commissioner of Land Titles (Pesuruhjaya Hakmilik Tanah

Daerah) for it to be determined in accordance with the law. No appeal was lodged by any of the parties against the 1995 Order. Instead, the Deputy Director complied with that order and proceeded to conduct an enquiry. On 16 April 1998, he decided and measured the boundary of Lot 78 in accordance with HWM (the second decision). It resulted in the disputed land forming part of Lot 78.

[8] Meanwhile, the first defendant continued to occupy the reclaimed land, including the disputed land under the TOL. On 30 August 1999, the first defendant applied for alienation of a portion of the reclaimed land (excluding the disputed area). On 27 August 2004 the first defendant was issued with a document of title for the portion of the reclaimed land, now known as PT10.

[9] The first defendant in a letter dated 1 April 2005 queried on the status of the disputed land. It was responded by the third defendant on 19 April 2005, to say that the first decision was the correct decision and not the second decision. Thereafter on 14 November 2005, the first defendant applied to the State Authority for alienation of the disputed land. It was approved subject to payment of a premium of RM5,647,822. The first defendant duly paid they said premium on 14 May 2007.

[10] In its claim, the plaintiff sought for various declarations and orders. In essence, the plaintiff maintained that the second decision would have to be complied by the defendants. The plaintiff also sought orders for the first defendant to vacate the disputed land, and claimed for loss and damages suffered, resulting from the alleged wrongful occupation.

[11] The trespass suit did not proceed to a trial. By consent of parties, it was resolved by way of an application by the plaintiff (in encl. 51) pursuant to O. 14A and O. 33 rr. 2 and 5 of the Rules of Court 2012. The following questions were set out for the determination in that application:

> 1. Whether the decision of the Deputy Director of Land Titles, Penang dated 16 April 1998 ("2nd Decision") is final and conclusive with respect to the area of Lot No. 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ("the Land") and the boundary of the Land to be measured based on High Water Mark ("HWM");
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> 2. Whether the 2nd Decision prevails over and/or supersedes the decision of the Deputy Director of Land Titles, Penang dated 10.12.1970 and/or 22.07.1985 ("1st Decision") that the boundary of the Land is measured based on Traverse Mark ("TM");
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> 3. If the questions (1) and (2) above are answered in the affirmative:
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> (a) Whether the plaintiff is the legal, beneficial and registered owner of the Land which includes the area measured based on HWM;
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> (b) Whether the purported Temporary Occupational Licenses issued by the 2nd Defendant to the 1st Defendant are null and void;

(c) Whether the 1st Defendant is liable for trespass on the Land;

(d) Whether the 1st Defendant ought to vacate that part of the Land which is being trespassed on and to repair and/or restore the said part of the Land to its original condition prior to the trespass;

(e) Whether the 2nd Defendant is to amend the Register of Titles and/or take all necessary steps to reflect that the Land is measured based on HWM as shown in Plan No. 544; and

(f) Whether the Defendants are liable for losses and damages (to be assessed) suffered by the plaintiff.

[12] The High Court allowed encl. 51 against all the defendants. The learned Judicial Commissioner (JC) answered questions 1 to 3 above in favour of the plaintiff. In gist, the learned JC held that the 1995 Order is a valid order of the High Court, and *ipso facto* the second decision of the Deputy Director of Land Titles is a good decision. His Lordship further found that the defendants had failed to substantiate their claim to impugn the 1995 Order on the basis that it was an appeal on the point of facts, not law as envisaged by s. 19.

[13] On the argument that had the 1995 Order been made on questions of law it should be remitted to the Board and not the Director, the learned JC applied s. 21 of Act 518. The learned JC then held that the second decision was final and conclusive and it had indeed superseded the first decision. The effect of which, the disputed land forms part of the land of the plaintiff.

[14] Two separate appeals were lodged before the Court of Appeal on the decision of the High Court. One by the first defendant and the other by the second and the third defendants.

In The Court Of Appeal

[15] The Court of Appeal allowed both the appeals. The Court of Appeal impugned the 1995 Order, applying the principle of law in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393. The Court of Appeal held that since the first decision was a decision on border dispute, it was a final decision under s. 27(3) of Act 518. Therefore, there could not be any appeal to the Appeal Board pursuant to s. 15. Hence there was no competent appeal before the Board to enable further appeal to the High Court under s. 19(1). Consequently, the Court of Appeal held that the 1995 Order was null and void. Concerning ss. 19 and 21, the Court of Appeal in its grounds of judgment stated as follows:

> [65] With respect, we disagreed with the learned JC. Firstly, in our judgment, section 21 is not applicable to the facts of the instant case. As set out above, section 21 empowers the Director or the Board to vary or set aside its own decision on the grounds stipulated under paragraphs (a) to (d). It is a power that is exercisable at the instance of the Director and the Board. The order of the High Court dated 22.9.1995 and the

remittance by the High Court for the matter to be re-determined by the Commissioner does not fall under any of the circumstances enumerated under paragraphs (a) to (d) of section 21 of the Act.

[66] Secondly, as regards to section 19(1), it must be emphasised that the provision speaks of appeal from the decision of the Board. There must, at the outset be a competent appeal under section 15 before the Board on which the Board made its decision. Against the decision of the Board made pursuant to section 16(b), an appeal shall then lie to the High Court on points of law pursuant to section 19(1). Since section 15 excludes appeals from the decision of the Director on the determination of boundaries, there can be no appeal to, and no decision of the Board, if there was no decision of the Board, the issue of an appeal to the High Court on a point of law from the decision of the Board (insofar as an appeal is excluded by section 15), did not arise.

[67] The learned JC relied on the words "selaras dengan undang-undang" contained in order dated 22.9.1995 to hold that the appeal before the High Court must be on a point of law. In our view the wordings "selaras dengan undang-undang" *per se* were not conclusive that the appeal before the High Court was on points of law.

[16] The Court of Appeal also observed that had there been any point of law that was before the High Court, it ought to have been remitted to the Board to be rectified. The 1995 Order instead, ordered the Commissioner and not the Board to re-determine the boundary. As such, it was held that the 1995 Order could not support the plaintiff's case that the appeal to the High Court was brought on points of law from the decision of the Appeal Board, as envisaged by s. 19.

[17] Following from these findings, the Court of Appeal allowed the appeal against the plaintiff and set aside the decision of the High Court. The first decision was therefore upheld as legally effective and the second decision was found to be a nullity in law.

[18] Arising from the decision of the Court of Appeal, there are two appeals filed by the plaintiff. Civil Appeal No: 01(f)-3-02-2018 is against the second and the third defendants and Civil Appeal No: 02(f)-5-02-2018 is against the first defendant. The appeals are lodged upon obtaining leave to answer three questions of law. We begin with the first question.

[19] Question 1:

Whether a party seeking to collaterally attack/challenge a sealed and perfected court order is required to take an active step in filing an application (either in the same proceedings or in separate proceedings brought for that purpose) to set aside the court order, in circumstances where that party failed to appeal.

As it is clean from the question postulated above, the plaintiff in its appeals raised issues on both the substantive law as well the legal procedure employed in the determination of illegality of the 1995 Order. Thus the main

issue that lies at the heart of these appeals is first, whether the 1995 Order is an illegal order made in excess of jurisdiction and liable to be set aside. The next question that follows is whether a party seeking to challenge a sealed and perfected order of the court which has not been appealed upon is required to take an active step in filing an application either in the same proceedings or in a separate proceeding brought specifically for the purpose of setting aside the court order. To put it in another way, can the defendants challenge the 1995 Order, by just raising it in the defence to the trespass suit by the plaintiff.

[20] To recapitulate, the basic premise of the trespass claim by the plaintiff was anchored on the difference in the measurement of the disputed land. The first defendant was alleged to have continued its occupation on the disputed land against the right of the plaintiff. On top and above that, the first defendant had proceeded to even apply for the alienation of the disputed land. In the midst of these proceedings, the second defendant had in fact alienated the disputed land to the first defendant in direct contradiction of the second decision which was made by its own Deputy Director of Land Titles. The title was however cancelled following contempt proceedings filed by the plaintiff.

[21] The plaintiff's case was that the second decision was validly made in the presence of all parties including, their respective legal counsel. The remittance order in the 1995 Order was not challenged and neither was the consequent second decision. Following the second decision, the disputed land was decided to be within the plaintiff's land, hence a case of trespass was made out.

[22] The plaintiff then questioned the procedure adopted by the defendants in posing the challenge on the validity of the 1995 Order. It was brought upon by merely raising it as a defence to the claim of trespass by the plaintiff against them. The plaintiff contended that a separate proceeding must be undertaken by the defendants and not through collateral process because that would tantamount to extending the allowable time of appeal of the 1995 Order. This was said to be appealing the 1995 Order through the backdoor.

[23] Before we move on further, it would appear to us that it is beyond dispute between parties, and it is also an acceptable legal position that any order of the court made in excess of jurisdiction is liable to be set aside. The divergent views in these appeals are first, whether 1995 Order is an order made in excess of jurisdiction, and if so, it can be set aside by way of a collateral attack without any other step to challenge the same.

Jurisdiction And Illegality

[24] We first deal with the issue on illegality of the 1995 Order as found by the Court of Appeal. As earlier stated, the Court of Appeal held that the 1995 Order was made in excess of jurisdiction. The lack in jurisdiction was reasoned on the basis that the first decision was a final order on border

dispute as envisaged by s. 27(3), hence not a decision appealable to the Board in light of s. 15 of the Act. The appeal made by the plaintiff to the Board was found incompetent, and thereby no issue of further appeal under s. 19 to the High Court.

[25] Further to that, the Court of Appeal opined that the 1995 Order would not be an appeal on questions of law but merely on questions of facts. In concluding so, it was observed in para. [66] of its judgment that:

> ... Since section 15 excludes appeals from the decision of the Director on the determination of boundaries, there can be no appeal to, and no decision of the Board. If there was no decision of the Board, the issue of an appeal to the High Court on a point of law from the decision of the Board (insofar as an appeal is excluded by section 15), did not arise.

[26] As contended by the plaintiff, the Court of Appeal had erred in holding that the 1995 Order is an order made in excess of jurisdiction. Section 19 it was argued, indeed confers jurisdiction on a High Court to hear appeal *albeit* on questions of law. It was submitted that the Court of Appeal had wrongly inferred that it was an appeal on questions of facts and not law though the defendants had failed to discharge the burden of proving the same. In doing so, it was contended, the Court of Appeal had arrived at its decision without the defendants discharging the burden imposed on them, in law.

[27] On the issue of burden of proof, it is pertinent to note and analyse the position taken by the respective defendants on the issue of jurisdiction. The first defendant initially took the position that it was not clear whether or not the appeal was brought on the points of law or facts. Also, it was not clear whether the finality provision of Act 518 was canvassed before the High Court. That notwithstanding, the first defendant insisted in its submission before us that, the High Court in Penang had in fact dealt with questions of facts, in the issuance of the 1995 Order.

[28] For the second defendant, learned counsel cited the various provisions in the Act to contend that the legislative intent to make the decision on border dispute a finality, was clear. It was further argued that a finality clause must be given effect as decided by this court in *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 8 CLJ 163. In that case, s. 16(2) of the Electricity Supply Act 1990 provides that, the decision of the State Authority on compensation is final and this court had held that the effect of the finality clause was to prevent appeal and such decision was final. Given the legal position, learned counsel contended, no valid appeal could have been made to the High Court which culminated in the 1995 Order.

[29] Having considered the arguments of learned counsel both oral and written, we agree with the plaintiff that adhering to the basic rule on the evidential burden, the defendants bear the burden of proving that the appeal before the High Court pursuant to s. 19, was not on question of law but merely on facts. The learned trial judge was correct in imposing the burden on the defendants to prove that the appeal was wrongly brought by the

plaintiff. It was the findings of the High Court that the defendants had failed to adduce evidence in support of their contentions. The conclusion of the Court of Appeal that it was made on questions of facts was not supported by evidential proof.

[30] It must be borne in mind that all the defendants participated in that appeal proceedings together with their respective counsel. They should have raised their objections there. Moreover, they had accepted that decision as they never appealed on the 1995 Order. By not appealing the said order means the defendants accepted the correctness of the decision (see *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLJ 461). Despite not challenging the 1995 Order, the first defendant merely ignored that second decision. Likewise, the second and the third defendants too having failed to appeal on the 1995 Order, and having complied with the same, then chose to question back what was in fact, their own decision.

[31] It is patently clear that when the second decision was made, the third defendant was merely complying with the 1995 Order. Ironically the third defendant had now to stand on his own for doing so as the second defendant sought to question that second decision, which was made by his own office.

[32] Evidentially, the position taken by the defendants as to whether the appeal was brought on facts or law is neither here nor there. What we have is the 1995 Order which is, in essence, a remittance order. On the face of it, it is a clear remittance order for the matter to be decided in accordance with law. Though the Court of Appeal viewed the nature of the 1995 Order which says "... untuk menentukan perkara yang sama selaras dengan undang-undang" as *per se*, not conclusive that the appeal was on points of law, with respect, we are of the view that an order for the matter to be decided in accordance with law, implies that the decision before the court was not in compliance with the law in the first place. Though by tracing through the various clauses that we have earlier alluded to, may suggest that there was to be no appeal on border dispute as envisaged by s. 27(3), it must be noted that s. 19 indeed confers the appellate jurisdiction on the High Court. Hence it cannot be said that the High Court is not seised with jurisdiction at all, to hear the appeal. We say so for the following reasons.

Jurisdiction Under Section 19

[33] Our first reason is that, even if the Penang High Court had been wrong to treat the appeal before it, as an appeal on the point of law, it is merely an error of fact or law. In our view and with respect, s. 19 is not an exclusion clause, instead it confers the High Court with appellate jurisdiction. An error of fact or law, at worst is only equivalent to a wrongful exercise of power. Viewed in this context therefore, it is not a case where the High Court lacks jurisdiction to hear any appeal.

[34] On this point and in the context of an industrial court dispute, it is useful to note the following observation by learned author V Anantaraman, when he said:

> A mere error of law is an error within the jurisdiction of the industrial court, and invariably arises out of misinterpretation of the provisions of the industrial law applicable to the dispute inquired into by the Industrial Court.; Specifically, once the Industrial Court has jurisdiction to hear and decide the dispute on its merits, and in the process of applying the specific provision of the industrial law relevant to the dispute, the Industrial Court misinterprets that statutory provision, such a misinterpretation is deemed to be a mere error of law. To put it differently, the Industrial Court did not exceed its jurisdiction but only misinterpreted the law. The reviewing court cannot hold such decisions of the Industrial Court *ultra vires* of that statutory provision and therefore null and void (See V Anantaraman, *Judicial Review: The Malaysian Experience (II)* [1994] 1 MLJ lxv).

[35] As an aggrieved party, the plaintiff had the right of recourse to file an appeal against the decision of the Board for the court's determination. In this regard, we take into consideration the approach taken by the court in applying and construing the provision of similar nature. One such instance would be s. 42 of the Arbitration Act 2005. Section 42 says:

> Any party may refer to the High Court any question of law arising out of an award.

[36] Analogous to s. 19, s. 42 of the Arbitration Act (now repealed) clothes the court with the statutory jurisdiction to hear a challenge against an arbitral award on point of law. The approach taken by the court in dealing with s. 42 application is to first, determine whether it is a question of facts or question of law. In the event the court determines that it is a question of law, the court then will proceed to hear the application (see *Awangku Dewa Pgn Momin & Ors v. Superintendent Of Lands And Surveys, Limbang Division* [2015] 3 CLJ 1; [2015] 3 MLJ 161).

[37] The Court of Appeal in *Chain Cycle Sdn Bhd v. Kerajaan Malaysia* [2016] 1 CLJ 218; [2016] 1 MLJ 681, set aside the order of the High Court made under s. 42 of the Arbitration Act 2005 on the basis that the determination of damages was a determination of fact and not law. It was held as a wrong order by the Court of Appeal. Thus, it is not a case of excess of jurisdiction when a case is brought on issues of fact and not law as required under s. 42. Such wrong order is liable to be overruled on appeal.

[38] The reverse would also be true. If the Penang High Court had wrongfully answered a question of facts in the belief that it was answering a question of law in issuing the 1995 Order, it would not mean that it had acted in excess of jurisdiction. All it means is that the Penang High Court was wrong in failing to appreciate that the point of law determined, was a question of fact. And the recourse available to the defendants is also to take up the 1995 Order on appeal.

A **Inherent Jurisdiction**

[39] Our second reason is the inherent power of the superior court. Central to the issue of jurisdiction, we must not overlook the fact that a superior court has always been endowed with inherent jurisdiction in addition to powers conferred by a Code or a statute. Jurisdiction of the court in Malaysia is
B derived from art. 121 of the Federal Constitution. This includes the power of judicial review and to review the decision of public authorities. It is also well accepted that generally speaking, in the realm of administrative law and in any dispute between a citizen and the State, the superior court has the inherent jurisdiction to rule on constitutionality or legality of all
C governmental action (see *Pengarah Tanah Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135).

[40] As observed by Sir Jack Jacob in his article "*The Inherent Jurisdiction of the Court*" (1970) Current Legal Problems, Vol. 23:

D
> If the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticised as being "metaphysical", but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law
E necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court
F of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

With the intrinsic jurisdiction endowed in the court, the High Court cannot
G be precluded from issuing the 1995 Order. An inherent jurisdiction generally speaking, may not be excluded even by statute. Far from excluding any jurisdiction, s. 19 in essence empowers appeal to be made, *albeit* on question of law. Thus if nothing else, at least, by its inherent jurisdiction the 1995 Order was legally issued.

H **No Clear Breach Of Statute**

[41] Our next reason is that the 1995 Order is not issued in clear breach of a statute. Decided authorities are clear that an order of the court becomes a nullity only when it is made in clear breach of a statute, hence in excess of jurisdiction. A survey on these cases reveals that in all cases of illegality
I (which had been impugned by the court) of either administrative orders or orders of a court, they are clearly in breach of statutes *a fortiori* in excess of jurisdiction. Decided authorities are also replete with decisions on the sanctity and the need to observe a binding court order.

[42] In *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, there were two orders for sale made by the Collector of Land Revenue pursuant to s. 263 of the NLC. The first order had erroneously left out eight of the properties involved. Subsequently, another Collector made a second order to correct the first order for sale. The plaintiff sought to enforce the second order for sale and was allowed by the High Court. On appeal to the Federal Court, the High Court Order was set aside on the basis that the second order by the Collector was a nullity under s. 263 because it was made *functus officio*.

[43] In *TRA Mining (Malaysia) Sdn Bhd v. Thien Hong Teck & Ors And Another Appeal* [2018] 10 CLJ 438; [2019] 1 MLJ 212, the winding-up order made by the High Court in Malacca was found to be illegal for failure to comply with s. 314 of the Companies Act 1965. In *Malayan Banking Bhd v. Gan Bee San & Ors And Another Appeal; SKS Foam (M) Sdn Bhd (Intervener)* [2019] 1 CLJ 575 the winding-up order made by the Senior Assistant Registrar (SAR) was found to be null and void, because it was made in excess of jurisdiction since the SAR had no authority to issue a winding-up order. The authority to do so is only conferred on a judge in chambers in accordance with r. 5(1)(a) of the Companies (Winding-up) Rules 1972.

[44] In *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, the High Court Judge issued an order for sale after hearing parties despite the plea of *non est factum*, an allegation of fraud and forgery. The order was finalised as there was no further appeal. An application was made by the respondent to set aside the order before the same judge but was refused. The respondent later made another application to set aside the two previous orders on the same grounds. This time the same judge set aside his own order. This court allowed the appeal and held that the learned judge was *functus officio* hence no jurisdiction to alter or set aside a judgment regularly obtained, after it had been entered and a final order had been drawn up.

[45] This court had in *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 8 CLJ 163; [2017] 1 MLJ 689 held that judicial pronouncements have always been clear that a court order holds good and is valid until it is set aside. An order of a superior court must be deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside (see *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761 (FC)). The Supreme Court in *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors* [1997] 2 CLJ 58; [1997] 2 MLJ 105, reminded that a superior court like the High Court is a court of unlimited jurisdiction. Quoting Lord Diplock's statement in *Isaacs v. Robertson* [1984] 3 All ER 140 the Supreme Court held that it must be obeyed and could only be challenged in a direct application to set it aside.

[46] The Supreme Court in *Puah Bee Hong @ Bee Hong (F) & Anor. v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Robert Teo Keng Tuan, Intervener) & Another Case* [1994] 2 CLJ 705; [1994] 2 MLJ 601 opined that an order of a superior court (such as the High Court) even if it is an order obtained *ex parte* or a default judgment, requires a plain and unqualified obligation of every person, against or in respect of whom an order is made unless and until the order is discharged. Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567, reasoned for such observation on the basis that a superior court must be presumed to have the jurisdiction to make an order which it has made. Hence every order made by a superior court must be regarded as an order of competent jurisdiction.

[47] In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd (supra)*, the appellants were the registered co-owners of a Malay reserved Land. The appellants had charged the land by way of a third party charge to secure a loan advanced to the business associate of the appellants. When there was a breach of the loan agreement, the appellants *inter alia* sought for a declaration that the charge was invalid, for contravening the Malay Reservation Enactment. The High Court granted the declaration but at the same time ordered for the appellants to repay the loan (the first order). Two years later the same judge made an order that the appellants having received benefits from the respondent ordered for the land to be sold and the proceeds of which to pay the outstanding balance of the loan (the second order). The appellants did not appeal on that second order. They filed proceedings afresh to have the second order set aside on the ground that it contravened the Malay Reservations Enactment (FMS Cap 142). It was allowed by the High Court because the second order contravened a written law, FMS Cap 142. This court upheld that decision as it was found that the judgment based on the second order was null and void on the ground of illegality or lack of jurisdiction and was rightly set aside.

[48] It is also worthy of emphasis that even a default judgment is a good and enforceable judgment until it is set aside (see *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343; [1991] 1 MLJ 100). The default judgment in this case until set aside was found to be a good and enforceable judgment citing in support *Isaacs v. Robertson (supra)* where the headnote reads:

> Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void *ipso facto* without the need for proceedings to set them aside.

[49] In *TO Thomas v. Asia Fishing Industry (Pte) Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151, it was held by this court that "An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged". The Court of Appeal in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 4 CLJ 883; [1998] 4 MLJ 297, observed that a party could not ignore or refuse to comply with a court order on the ground of nullity. In another case of *Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee* [2018] 1 CLJ 641; [2017] MLJU 1937, the Court of Appeal had once again emphasised that a court order is a court order, it must be obeyed as ordered unless set aside or varied. And it is not a mere technicality that can be ignored.

[50] Again in *Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah, Selangor* [2015] 1 LNS 7; [2015] 2 MLJ 768 the Court of Appeal held that it was an entrenched principle in our jurisprudence that all orders of court must be obeyed by the relevant parties (unless the order is set aside) citing also *Hadkinson v. Hadkinson*. It is also well-settled too that the motive for disobedience is irrelevant (*R v. Poplar Borough Council, ex parte London County Council (No 2); R v. Same, ex parte Managers of Metropolitan Asylums Board (No 2)* [1922] 1 KB 95). In *Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors* [2018] 10 CLJ 222, the Court of Appeal held and found an order on the proceedings be held *in camera* evidence, is to be observed because it remains valid and binding until it is set aside.

[51] From all the above-cited authorities, we find it clear that the cases are in a chorus that a court order is found to be a nullity only if it clearly breaches a statute and hence in excess of jurisdiction. The High Court in issuing the 1995 Order was not in clear breach of any statute. If at all, and even if made on questions of facts, it may be a wrong order and not a nullity. For the reasons we have stated we hold that the High Court was not in excess of jurisdiction in issuing the 1995 Order. Hence the 1995 Order is not a nullity. Consequently, the second decision is therefore, valid and enforceable.

[52] The other legal principle to be derived from all the above cases is that a specific action whether in the same or separate proceeding is required to set aside an enforceable binding order of a court. This then brings us to the issue of collateral attack.

Collateral Attack

[53] On the issue of collateral attack, the High Court held that the 1995 Order is a court order, and it cannot be challenged in a collateral proceeding. The defendants cannot impugn its validity laterally without first applying for it to be set aside. The learned JC held that the defendants could not now dispute the jurisdiction of the High Court, which in effect tantamount to a

backdoor attempt to challenge a binding order in order to defeat the plaintiff's claim for trespass. This issue was not dealt with by the Court of Appeal in its grounds of judgment.

[54] For the defendants, the position taken by them being that the 1995 Order and the second decision was a nullity and may be ignored, and disregarded, despite taking no step to first set it aside. Learned counsel for the defendants cited to us the decision of this court in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 to contend that an order of a court may be impugned if made in contravention of a statute.

[55] We have examined the decision in *Serac Asia*. In that case, an application was made to strike out a court order for being illegal or excess of jurisdiction. The application was made in the same proceedings. At p. 35 of the judgment, Abdul Hamid FCJ referred and summarised the decision of *Badiaddin* that where an order of the court was obtained in a manner which contravenes a statute, resulting in an order being illegal, the court has the inherent jurisdiction to strike it out *ex debito justitia*. However, it is to be noted that in *Serac Asia* too, a separate application was made to strike out the impugned order.

[56] Back to the instant appeals, from the year 1995, the second defendant had never informed the plaintiff that the second decision that was made by them was wrong or to be ignored on the basis that the 1995 Order was a nullity and that the Deputy Director of Lands Titles had acted in excess of jurisdiction in arriving at the second decision. The plaintiff was made aware of the position taken by the second and the third defendants.

[57] It is indeed beyond comprehension that the position taken by the second defendant on the second decision is a total disavowal of the decision made by its own Deputy Director of Land Titles. We find it rather perplexing, when the second decision made obviously by an officer of the second defendant, who had acted on the 1995 Order became a dispute by his same office. The second defendant rightly should support its own decision or at the very least took a neutral stand. It is difficult in the circumstances, to appreciate any good reason for the second defendant to take up such a stand. This itself may attract some other legal complications, which we find it unnecessary to deliberate upon, since parties do not raise it as an issue.

[58] Now, even if the 1995 Order is a nullity, in our view, the defendants should not be allowed to impugn the 1995 Order, in the way that they did. The list of authorities above is clear on the procedure to be adopted. The defendants sat on the 1995 Order which they believed to be a nullity for a span of 15 over years, only to raise it as a defence to an action of trespass. If this is allowed, it will lead to serious implications. The effect of which, floodgates will be opened to a never-ending litigation. It certainly removes

the valued certainty that court's process provides. Besides, it allows a backdoor way of appealing on a decision of the court, way out of the given time under the law.

[59] It cannot be opened to any person to decide upon himself whether an order of a court which binds him is wrongly issued and does not require his obedience. Until such time, it is set aside or varied the order of court is entitled to the obedience and respect from all parties. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences (see *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217).

[60] It must be borne in mind that, there is a legal presumption that an order of a court is validly made, unless it was obtained by fraud, etc. It bears repeating that the 1995 Order was made by the High Court with unqualified participation of all relevant parties. The parties were also represented by their respective counsel as disclosed in the 1995 Order itself. A court order regularly made cannot be ignored on the belief of a party that it is a nullity. Any such attempt would militate against the basic legal position as pronounced in the various earlier cases on the subject, that a regularly made order of court must be observed at all costs.

[61] The Court of Appeal had not advanced this procedural issue in its grounds of judgment. It was argued by learned plaintiff's counsel that the failure of the Court of Appeal to act and decide as enunciated in the earlier cases by this court, on the face of record is bad under the Federal Constitution, as it compromises the authority and jurisdiction of the court. It would also pave the way and stand as a precedent for relevant parties to breach an order of the court. This would lead to a chaotic situation and would compromise judicial authority.

[62] In relying on the decision of this court in *Badiaddin*, the Court of Appeal failed to note that, even in *Badiaddin* itself, there was a fresh proceeding filed to set aside the relevant court order therein. *Badiaddin* is therefore not an authority to suggest that an order which is illegal may be impugned in a collateral proceeding as done in the instant appeal. As explained by Peh Swee Chin FCJ in that case:

> When a judgment in the High Court has been perfected ... a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot reopen the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the *ratio* of *Hock Hua Bank Bhd v. Shahari Murid*.

Besides the above observation, Peh Swee Chin FCJ went on to state that:

> Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation.

[63] The above observation was made on the basis that a superior court is not an inferior court or statutory tribunal (such as a Land Administrator under the National Land Code as in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37). Then His Lordship went on to add that:

> It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by **raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first**. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank Bhd v. Sahari bin Murid* ... (emphasis added)

[64] In the judgment of Mohd Azmi Kamaruddin FCJ in *Badiaddin* His Lordship observed that a person affected by the order is entitled to apply to have it set aside. Gopal Sri Ram JCA in the same case echoed similar observation where in the words of His Lordship:

> I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside **in proceedings brought for that purpose**. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. (emphasis added).

[65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a court order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because in his view it is not valid. If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.

[66] It is, therefore, a long established principle of law that one may apply to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well the finality of an order of court. We therefore do not find any reason to depart from all these earlier decisions on this particular point.

[67] From the above discussions, we are clear in our minds that, question 1 posed must be answered in the affirmative.

[68] The next question which was allowed in the leave application is question 2, which is phrased as below:

> Whether the principle enunciated in the Federal Court case of *Tenaga Nasional Berhad v. Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689 that an administrative body/tribunal/decision-maker was not entitled to review its previous decision can be extended to circumstances where the administrative decision-maker had reviewed its previous decision upon the remittance of the matter back to it to be re-determined, acting in compliance with a sealed and perfected Court Order.

[69] The above question centres on the decision of this court in *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd (supra)*. It was cited by the defendants in support of the finality clause. In that case, the relevant issue was whether an administrative tribunal could review its own decision despite the finality clause. It is different in the present appeals. The administrative body in the present appeals issued the second decision, in adherence to the 1995 Order of the High Court.

[70] Our perusal of the grounds of judgment in both the courts below reveals that the issue as posed in question 2 above is not the issue that determined the decision made by the Court of Appeal. The High Court, however, did touch upon the matter briefly to support its judicial finding that a court order holds good and valid till set aside. In any event, *Tenaga Nasional Berhad v. Bandar Nusajaya Development Sdn Bhd (supra)* dealt with a different factual scenario and is not relevant to the facts of the instant appeals.

[71] Question 3 was granted leave in furtherance of question 2 where it says, further to question 2, is the aforementioned decision arrived at by the administrative body/tribunal/decision-maker still susceptible to a collateral attack on the grounds of excess of jurisdiction or nullity. Looking at both these questions, we agree with learned counsel that they are not issues which would determine the outcome of the appeals before us. We are minded not to deliberate on the same, and we decline to answer both these question 2 and question 3.

[72] As the answer to question 1 is in the affirmative. We unanimously allow the appeals of the plaintiff with costs. We set aside the order of the Court of Appeal and affirm the decision and orders made by the High Court pursuant to the application of the plaintiff in encl. 51.

[73] This judgment is prepared pursuant to s. 78 of the Courts of Judicature Act 1964, as the Chief Judge of Malaya, Zaharah Ibrahim and Balia Yusof Wahi FCJ, had since retired.